

STATE OF MICHIGAN
COURT OF APPEALS

BANK OF NEW YORK MELLON,

Plaintiff/Counter Defendant-
Appellee,

v

PAUL G. JENSEN and ANGEL MILLSAP,

Defendants/Counter Plaintiffs-
Appellants.

UNPUBLISHED

September 11, 2014

No. 315751

Macomb Circuit Court

LC No. 2012-005630-CZ

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendants appeal as of right an order granting plaintiff's motion for summary disposition in this mortgage foreclosure dispute.¹ On appeal, defendants argue that the trial court erred in granting plaintiff's motion for summary disposition. We affirm.

On July 26, 2006, defendants obtained a \$168,000 mortgage loan from Countrywide Home Loans, Inc. (Countrywide) to purchase real property located at 11245 Hanna Drive, Sterling Heights, Michigan. A promissory note was executed between Countrywide and defendants. As security for the note, defendants granted a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS). MERS was identified "solely as nominee for Lender and Lender's successors and assigns." On October 20, 2006, the mortgage was recorded in the Macomb County Register of Deeds.

On May 11, 2011, MERS assigned the mortgage to plaintiff, "the Bank of New York Mellon fka The Bank of New York, as trustee for Certificateholders CWALT, Inc., Alternative Loan Trust 2006-28CB, Mortgage Pass-Through Certificates, Series 2006-28CB." On May 13,

¹ In the trial court, defendants filed a counterclaim, and plaintiff filed its motion for summary disposition in regard to the counterclaim. For ease of reference, the parties are referred to only as plaintiff and defendant, as opposed to plaintiff/counter-defendant and defendants/counter-plaintiffs.

2011, the assignment was recorded with the Macomb County Register of Deeds. Defendants thereafter defaulted on the promissory note and mortgage, and plaintiff commenced foreclosure proceedings by advertisement. A sheriff's sale was held on August 18, 2011, plaintiff purchased the property, and a sheriff's deed was executed. The statutory redemption period expired on February 18, 2012; defendants did not redeem the property during the redemption period.

On June 11, 2012, plaintiff filed a complaint for termination of tenancy in the district court. Defendants thereafter filed a counterclaim for wrongful foreclosure and breach of contract, and the counterclaim was removed to the circuit court. Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(8), which the trial court granted. Defendants now appeal.

Defendants argue that the trial court erred in granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(8) because there was a question of fact regarding the existence of fraud or irregularity in the foreclosure proceeding. We disagree.

A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the pleadings alone." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). A motion under MCR 2.116(C)(8) may not be supported with documentary evidence, but if a claim or defense is based on a written instrument, the document must be attached to the pleading unless it is a matter of public record and its location is stated in the pleadings. *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 305; 788 NW2d 679 (2010); MCR 2.113(F).² A motion should be granted under MCR 2.116(C)(8) "only when the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Clohset v No Name Corp*, 302 Mich App 550, 558; 840 NW2d 375 (2013) (internal quotation marks omitted). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and are construed in the light most favorable to the nonmoving party. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012); *Gorman v American Honda Motor Co*, 302 Mich App 113, 131; 839 NW2d 223 (2013).

Michigan's foreclosure by advertisement statute is intended to give finality to purchasers of foreclosed properties, and, thus, a court's ability to set aside a foreclosure sale is limited. See *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969). Generally, after the redemption period has ended, and the mortgagor has failed to redeem the property, the purchaser of the sheriff's deed is vested with "all the right, title, and interest" in the property. MCL 600.3236. Michigan law provides that when redemption expires, former property owners can

² See also *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007) (holding that when an action is based on a written contract, a copy of the contract must be attached to the complaint, and it becomes part of the pleadings and may be considered in deciding a motion for summary disposition based on the failure to state a claim).

only challenge the validity of the foreclosure when they have made a clear showing of fraud or irregularity sufficient to justify setting aside the foreclosure. *Schulthies*, 16 Mich App at 247-248; see also *Sweet Air Inv, Inc, v Kenney*, 275 Mich App 492, 497; 739 NW2d 656 (2007) (holding that “it would require a strong case of fraud or irregularity, or some peculiar exigency, to warrant setting a foreclosure sale aside.”). Statutory foreclosures “will only be set aside if very good reasons exist for doing so.” *Kubicki v Mortgage Elec Registration Sys*, 292 Mich App 287, 289; 807 NW2d 433 (2011). However, the mortgagor’s claims of fraud or irregularity must relate to the sheriff’s sale itself, not to “underlying equities, if any, bearing on the instrument [or] legal capacity of the mortgagee or trustee. . . .” *Reid v Rylander*, 270 Mich 263, 267; 258 NW 630 (1935); see also *Mfr Hanover Mtg Corp v Snell*, 142 Mich App 548, 553; 370 NW2d 401 (1985) (noting that when a mortgagor brings a challenge to the foreclosure after the redemption period has expired, the mortgagor is limited to challenges that relate to the sale itself). “[D]efects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*.” *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 115; 825 NW2d 329 (2012). Because the foreclosure is rendered voidable, the mortgagor must also demonstrate prejudice caused by the alleged defect or irregularity before the foreclosure may be set aside. *Id.* “To demonstrate such prejudice, [the challenging party] must show that they would have been in a better position to preserve their interest in the property” absent the defect or irregularity. *Id.* at 115-116.

Defendants argue that the underlying assignment of the mortgage from MERS to plaintiff failed to comply with federal treasury regulations and New York state laws.³ Defendants assert that this alleged irregularity relates to the foreclosure procedure, and not to the underlying equities. We disagree. Defendants’ argument is not a challenge to an irregularity in the foreclosure procedure. Defendants challenge plaintiff’s legal capacity to foreclose on the mortgage based on alleged irregularities in the assignment of the underlying mortgage granting plaintiff an interest in the property. Challenges on such grounds have been expressly rejected by Michigan Courts. *Reid*, 270 Mich at 267. In addition, defendants failed to raise these arguments until after the foreclosure process and the redemption period were over. Because defendants’ claims relate to the underlying mortgage, they do not fit within the exception of fraud or irregularity. Accordingly, defendants’ claim on appeal lacks merit. Moreover, even assuming defendants could show fraud or irregularity in the proceedings, defendants have not shown that they were prejudiced. It is undisputed that defendants defaulted on their mortgage and did not attempt to redeem the property during the redemption period. Defendants, therefore, did not

³ In the trial court, defendants initially argued that plaintiff violated the statutes governing foreclosure by advertisement. However, on appeal, defendants only argue that plaintiff allegedly failed to follow treasury regulations and applicable state laws, thus invalidating plaintiff’s ownership of the mortgage.

show that “they would have been in a better position to preserve their interest in the property” had plaintiff followed the proper laws and regulations. *Kim*, 493 Mich at 115-116.⁴

Affirmed. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

/s/ Karen M. Fort Hood

⁴ Because plaintiff’s motion was properly granted as a matter of law, the trial court did not err in staying discovery. MCR 2.116(C)(8) “tests the legal sufficiency of the pleadings alone.” *Nuculovic*, 287 Mich App at 61.